Supreme Court, U.S.
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No. 96-399

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

TERRIL FLANAGAN, - - - - - *Petitioner*

versus

DAVID J. CAZALET,
ED CAHILL, and
RUSSELL COUNTY NEWSPAPERS,
INC., d/b/a *The Times Journal*, - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

PETITIONER'S REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a reviewing court may limit the number of findings that a jury reached in their determination of constitutional malice in a public figure defamation case.

PARTIES TO THE PROCEEDING

All the parties to the within proceeding before the Court whose judgment is sought to be reviewed are named in the caption to the Petition as filed in this Court.

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Petitioner, Terril Flanagan, respectfully submits this Reply to Respondents' Brief in Opposition to Petitioner's Petition for Writ of Certiorari seeking review of the November 3, 1995 Opinion Reversing rendered by the Kentucky Court of Appeals.

OPINIONS BELOW

The Opinion Reversing of the Court of Appeals, which was the highest court to actually review and decide the case, has been previously attached to the Petition herein.

JURISDICTION

This Court has proper jurisdiction over the case as set out previously in the Petition herein.

STATEMENT OF THE CASE

Regardless of the Respondents' attempts to obfuscate the facts of the case, a review of the actual Transcript for Trial speaks for itself in showing clearly that the petitioner was not merely the target of a "negative press" campaign, but also was the subject of Respondents' false and defamatory statements, printed under the guise of "opinion" or "editorial". The Jury was justified in its award of damages to the Petitioner, and the heart of this Petition goes to the Court of Appeals' clearly erroneous substitution of its own interpretation of Respondents' articles for those of the Jury. It should be kept in mind that Petitioner was the target of almost weekly articles (in a newspaper published weekly) and that the intent of the Respondents was to "get" the Petitioner – that is, to bring about his political demise. The Petitioner does not contend that the Respondents have no right to do so; however, the Respondents have no right to do so by printing lies about the Petitioner in order to achieve their goal.

The Court of Appeals found the Respondents' "editorials" to be either, substantially true, or protected opinion, but these findings, not the findings of the Jury, clearly go against the weight of the evidence. If the Petitioner submitted a balanced budget to the County Fiscal Court (as he was legally required to do), how can it be "substantially true" that he "washed his hands of the budget"? If the Petitioner directed the County Magistrates to perform their elected responsibility to work out the where-with-all to raise funds for the county financial needs, how is it "substantially true" or "protected opinion" that he "turned his back on the magistrates"? Obviously, all these statements are taken completely out of context, and that was one of the Court of Appeals' biggest errors – not viewing the statements in context and looking at the circumstances surrounding them. If they had done so, the Court of Appeals would have seen what the Jury saw, a series of false state-

ments put forth as facts, not opinions, about the Petitioner designed to malign, deprecate, and embarrass him.

Similarly, the article regarding the Petitioner's "vote" on buying health insurance for county employees was totally false. The Petitioner never voted on the issue, and the Respondents' quoted price of fifty-thousand dollars never came up at the meeting in question, nor did it originate from the Petitioner. Regardless of how the Respondents try to piece together some type of convoluted logic to justify this purely defamatory statement (again, taken in the context of an article attempting to malign the Petitioner as a wastrel of public funds and an idiot that lives in a vacuum), there is no other reasonable conclusion to be reached, either by a Jury or by the Court of Appeals, than that this statement was false.

REASONS FOR GRANTING THE PETITION

The Court of Appeals never made it past the very first step in the appellate review process. It prematurely, and erroneously, shut down its review of the case, and held, again erroneously, as a matter of law, that the Petitioner had no cause of action. Although the Court of Appeals framed its review as what a jury could find as the truth herein, it went on to totally substitute its own opinion as to what the truth was, as opposed to considering what a jury reasonably could find. There is no constitutional basis for this blatant usurpation of the Jury's role and none of the case law cited by Respondents is controlling on the issue. Indeed *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657 (1989) controls on this question, and has been followed in Kentucky; the Court of Appeals even begins its opinion with, presumably, this analysis in mind, and then goes on to completely ignore it. Significantly, the Respondents fail to address *Harte-Hanks*, Id., at all in their Response Brief in Opposition herein. Similarly, *Milkovich* v. *Lorain Journal Company*, 497 U.S. 1

(1990) rejected the defense that language denominated as "opinion" by the publisher is not actionable. The reviewing court must find whether the "opinion" implies facts provable as false; the threshold question is not merely is the language fact or opinion. Thus, the question of defamation is one for the jury to decide.

The Court of Appeals failed to apply the appropriate standard of appellate review and analysis to be applied herein. This Court should grant the Petitioner's Writ so that a clear statement on this issue may be generated.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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